

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

NO. 77-6155

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

**SAMUEL M. KAYNARD, REGIONAL DIRECTOR OF
REGION 29 OF THE NATIONAL LABOR RELATIONS
BOARD, FOR AND ON BEHALF OF THE NATIONAL
LABOR RELATIONS BOARD,**

Petitioner - Appellant,

v.

**LOCAL 282, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,**

Respondent - Appellee.

**ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK**

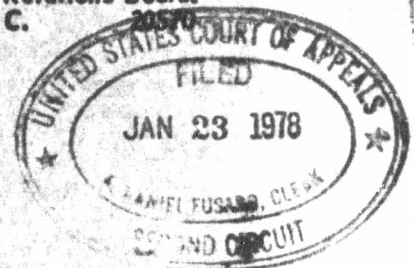
**REPLY BRIEF FOR
PETITIONER-APPELLANT**

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Cases citedPage

Bedding, Curtain & Drapery Workers Local 140 v. N.L.R.B., 390 F.2d 495 (C.A. 2, 1968), cert. denied 392 U.S. 905 (1968)	3
Beneson v. United States, 385 F.2d 26 (C.A. 2, 1967)	4
Compton v. National Maritime Union, 533 F.2d 1270 (C.A. 1, 1976)	8
Henderson v. International Union of Operating Engineers, Local 701, 420 F.2d 802 (C.A. 9, 1969)	7
International Longshoremen's Association Local 1575 v. N.L.R.B., 560 F.2d 439 (C.A. 1, 1977)	3
Local 26, I.L.G.W.U. (American Plant Protection Inc.), 210 NLRB 574	5
Local 282, I.B.T. (Active Fire Sprinkler Corp.), 233 NLRB No. 166	6, 7
Local 644, Carpenters v. N.L.R.B., 533 F.2d 1136 (C.A. D.C., 1975)	2, 3
McLeod v. National Maritime Union (Commerce Tankers Corp.), 457 F.2d 490 (C.A. 2, 1972)	7
Mills v. Long Island Rail Road Co., 515 F.2d 181 (C.A. 2, 1975)	4
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N.L.R.B. v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951)	3
N.L.P.B. v. Enterprise Association & General Pipefitters, Local 638, 429 U.S. 507 (1977)	3

N.L.R.B. v. International Van Lines, 409 U.S. 48 (1972)	4
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N.L.R.B. v. Plasterers' Union Local No. 79, 404 U.S. 116 (1971)	5, 7
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REPLY BRIEF FOR PETITIONER-APPELLANT

1. The Union's contention (Br. 10-14) that Section 9, Paragraph 2 of its High-Rise Agreement with Brady (A. 237) is a valid, primary "work preservation" clause and, therefore, that its picketing of Brady to enforce compliance with that clause was lawful, primary conduct is patently erroneous.

As we demonstrated in our opening brief, pp. 26-28, 30, since Section 9, Paragraph 2 of the Hi-Rise Agreement expressly permits the subcontracting of bargaining unit work so long as the subcontractor is also a party to or bound by the Agreement, the clause plainly constitutes

a "union signatory" subcontracting clause. As we further demonstrated, such a clause exceeds the permitted, work preservation objective and is secondary in thrust. As this Court has stated, such a clause reflects the union's "interest, independent of the interests of the employees being represented, in furthering its own organizational ends or in protecting the interests of its other bargaining units." N.L.R.B. v. National Maritime Union, 486 F.2d 907, 912 (1973). In addition to the cases cited in our brief in main, pp. 27-28, see also Local 644, Carpenters v. N.L.R.B., 533 F.2d 1136, 1142, 1144 (C.A. D.C., 1975) ("union signatory" clause secondary in nature since its purpose is "not to protect the work of employees already in the bargaining unit, but to enlarge the coverage of that bargaining unit by forcing the subcontractor to accept his contractor's agreement with the union"). ^{1/}

Moreover, to the extent that Section 9, Paragraph 2 of the contract may have had work preservation as an objective, it is clear that at least an object of the Union's picketing of Brady was for the plainly

^{1/} Contrary to the Union's assertion (Br. 12, n. 10), the Board takes no position as to whether the clause is independently violative of the Act or whether it falls within the protection of the construction industry proviso to Section 8(e). See our opening brief, p. 33, n. 20. Rather, the Board has simply asserted that the clause has a secondary, rather than a primary thrust and, therefore, even if protected by the construction industry proviso, it may not lawfully be enforced by job action. See the discussion and cases cited in our brief in main, pp. 28-29, 33-34.

secondary object of forcing Active to accede to the Union's demand that Active sign an agreement with the Union and employ Union members to drive trucks traditionally driven by members of Local 1 and Local 918. ^{2/}

Since the Union's picketing of Brady was thus undeniably "tactically calculated to satisfy union objectives elsewhere" -- that is, it was designed to influence the labor relations of Active -- it was clearly secondary in nature. National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612, 644-645 (1967). In such circumstances, an asserted work preservation interest cannot insulate the Union from the proscriptions of Section 8(b)(4)(B) of the Act. See, e.g., N.L.R.B. v. Enterprise Association and General Pipefitters, Local 638, 429 U.S. 507, 528-529, n. 16 (1977); Local 644, Carpenters v. N.L.R.B., supra, 533 F.2d at 1146-1149; International Longshoremen's Association Local 1575 v. N.L.R.B., 560 F.2d 439, 445-446 (C.A. 1, 1977). Compare, N.L.R.B. v. Local Union No. 28, Sheet Metal Workers, 380 F.2d 827, 831 (C.A. 2, 1967).

^{2/} Of course, it is well settled that the prohibited object need not be the sole object of the Union's conduct to render the conduct violative of Section 8(b)(4)(B), so long as it is an object. See N.L.R.B. v. Denver Building & Construction Trades Council, 341 U.S. 675, 688-689 (1951); Bedding, Curtain & Drapery Workers Local 140 v. N.L.R.B., 390 F.2d 495, 499-500 (C.A. 2, 1968), cert. denied 392 U.S. 935 (1968) and cases there cited.

2. The Union's argument (Br. 14-16) that the district court was clearly erroneous in finding reasonable cause to believe the Union violated Section 8(b)(4)(D) of the Act is unavailing.

Initially, it is clear that since the Union has not appealed from this finding, the issue is not before this Court for review. N.L.R.B. v. International Van Lines, 409 U.S. 48, 52, n. 4 (1972) and cases there cited; Morely Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 191 (1937); Mills v. Long Island Rail Road Company, 515 F.2d 181, 184 (C.A. 2, 1975); Terkildsen v. Waters, 481 F.2d 201, 205-206 (C.A. 2, 1973); Beneson v. United States, 385 F.2d 26, 29 (C.A. 2, 1967). But in any event, the Union's assertion (Br. 15-16) that since the district court found that the Union's picketing of Brady was primary there can be no Section 8(b)(4)(D) violation entirely misconstrues the plain intent and explicit language of that Section. ^{3/}

As explained in our opening brief, pp. 34-35, Section 8(b)(4)(D) was designed to eliminate strikes, threats and inducements in support of "disputes between two or more employee groups claiming the right to perform certain work tasks." N.L.R.B. v. Radio & Television Broadcast Engineers (CBS), 364 U.S. 573, 575-576 (1961). Unlike subparagraph (B) of Section 8(b)(4), subparagraph (D) does not draw any distinc-

^{3/} Of course, we strongly urge that the court below committed clear error in finding the picketing to be primary.

tion between primary and secondary conduct. While a union's conduct in support of a work jurisdiction dispute may, in fact, violate both Sections 8(b)(4)(B) and 8(b)(4)(D), ^{4/} a union may certainly violate Section 8(b)(4)(D) even though its conduct is directed toward and concerns but one employer. See, e.g., N.L.R.B. v. Radio & Television Broadcasting Engineers (CBS), supra. And, while the employer may or may not be deemed "neutral" to the dispute, in the sense that he may have no preference concerning which of the vying groups of employees ultimately performs the disputed work, even in that sense, the "neutrality" of the employer is irrelevant to a determination whether a work jurisdiction dispute exists. See N.L.R.B. v. Plasterers' Union, Local 79, 404 U.S. 116, 124 (1971). A violation of Section 8(b)(4)(D) occurs whenever a union engages in conduct described in Section 8(b)(4)(i) or (ii) in order to force the immediately affected employer or any other employer to assign work to its members rather than to members of another union or group of employees.

The cases cited by the Union (Br. 15) are clearly distinguishable on their facts. Thus, both Local 26, I.L.G.W.U. (American Plant Protection, Inc.), 210 NLRB 574 and National Maritime Union of America, AFL-CIO (Puerto Rican Marine Management, Inc.), 227 NLRB No. 155, 95 LRRM 1291, involved situations where the jobs previously performed by the

^{4/} See our opening brief, p. 33, n. 19.

picketing union had been completely eliminated by one employer and acquired by another employer and performed by his employees. And Printing Pressmen's Union (Metropolitan Printing Co.), 209 NLRB 320, involved a transfer of unit work from one employer to another at a different location rather than an assignment of the work from one group of employees to another by either employer. In the latter case, the Board specifically distinguished that situation from subcontracting cases in the construction industry. 209 NLRB at 321. Moreover, the argument that this case does not fall within the scope of Section 8(b)(4)(D) has been put to rest by the Board's finding in the underlying Section 10(k) proceeding in this matter that the facts herein present a traditional work jurisdiction dispute. Local 282, I.B.T. (Active Fire Sprinkler Corp.), 233 NLRB No. 166. ^{5/}

3. Contrary to the Union's assertion (Br. 17-18), the Board has not broadly interpreted this dispute as involving the delivery of materials or supplies to or from the jobsite, nor is this the basis for the Board's argument that the district court improperly limited the scope of

^{56/} Copies of the Board's determination and award have been submitted to the Court. As observed in our opening brief, p. 40, n. 23, this Section 10(k) award is not a final order and is not binding on the parties, nor is it now before this Court for review. It may be subject to court review in the context of enforcement or review proceedings of any final Board order issuing in the underlying unfair labor practice proceeding.

its order. Rather, we urged (Br. 36-38) that the record evidence clearly establishes that the Union sought to obtain the work of driving delivery trucks on the jobsite for the purpose of making multiple drops on the site, work assigned to employees who are represented by Local 918 or who are unrepresented. And, in fact, in its Section 10(k) proceeding, the Board found that this, indeed, was the breadth of the dispute. Local 282, I.B.T. (Active Fire Sprinkler Corp.), supra, 233 NLRB No. 166, slip op. p. 3. Accordingly, the district court's order should be appropriately broadened.

4. Finally, the Union's contention that the Regional Director failed to present any proof of injury warranting issuance of the injunction (Br. 18) is plainly without merit. Such an argument completely ignores the very purposes for which Section 10(1) proceedings in Section 8(b)(4)(D) cases are designed, namely, to terminate the "indefensible" jurisdictional strike in order to "protect employers and the public from [its] detrimental economic impact" (N.L.R.B. v. Plasterers' Local Union No. 79, supra, 404 U.S. at 130), to preserve the Board's jurisdiction to determine the dispute, and to permit Active to make work assignments free from threats or coercion until the Board finally disposes of the unfair labor practice charge. Henderson v. International Union of Operating Engineers, Local 701, 420 F.2d 802, 808-809 (C.A. 9, 1969); McLeod v. National Maritime Union (Commerce Tankers Corp.), 457 F.2d 490, 496

(C.A. 2, 1972); Compton v. National Maritime Union, 533 F.2d 1270, 1276 (C.A. 1, 1976).

In the instant case, there was clear injury to all parties involved. Because of the Union's actions, the construction site was shut down for several days, and Active was precluded from making its chosen work assignments and was eventually forced off the job. This is precisely the type of injury and disruption to commerce that Section 10(1) was designed to remedy and, accordingly, the court's grant of injunctive relief was just and proper. The only defects in the court's order are that it is not broad enough to enjoin the Union's unlawful attempts to obtain all the work in dispute and that it effectively made an interim work assignment.

CONCLUSION

For the reasons set forth above and for the reasons stated in our main brief, it is respectfully submitted that the case should be remanded for entry of an order granting the injunctive relief requested in the petition to the court below.

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January, 1978

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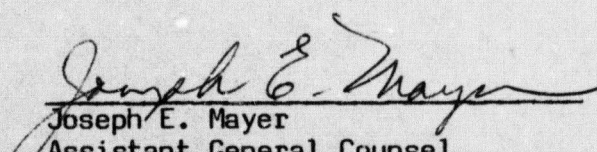
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, one copy
of the Reply Brief for Petitioner-Appellant, National Labor Relations
Board was duly mailed in a government franked envelope to counsel listed
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Dated at Washington, D.C.
this 20th day of January 1978